United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-6114
76-6119

To be argued by
Benjamin Gim

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 76-6114
76-6119

CHIN LAU,

Plaintiff-Appellee-
Cross-Appellant,

- v. -

MAURICE F. KILEY, District Director of the New York District, Immigration and Naturalization Service, United States Department of Justice,

Defendant-Appellant-
Cross-Appellee.

BRIEF AND APPENDIX FOR PLAINTIFF-APPELLEE

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ISSUES PRESENTED:

1. Whether a child born out of wedlock in China is nevertheless legitimate at birth under Article 15 of the Marriage Law of the People's Republic of China which was enacted to provide equality in legal status between in and out of wedlock children.

2. Assuming that out of wedlock children are not legitimate at birth under Article 15 and in the absence of a specific legal procedure for legitimating an out of wedlock child, did the District Court err by finding such a child eligible for immigration preference if it could be established that a factual legitimation had taken place.

3. Whether Section 101(b)(1)(D) of the Immigration and Nationality Act, 8 U.S.C. Sec. 1101(b)(1)(D), which grants preferential visas for out of wedlock children only when petitioned for by the natural mother violates the constitutional right to equal protection of laws by denying the same privileges when sought by the natural father.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHIN LAU, Plaintiff-Appellee-Cross-Appellant, - v. - MAURICE F. KILEY, District Director of the New York District, Immigration and Naturalization Service, United States Department of Justice, Defendant-Appellant-Cross-Appellee.	Docket Nos. 76-6114 76-6119

BRIEF FOR PLAINTIFF-APPELLEE

PRELIMINARY STATEMENT

Plaintiff-Appellee, Chin Lau ("Lau") on March 13, 1975 commenced this action for declaratory relief alleging that the decisions of the Immigration and Naturalization Service ("INS") and the Board of Immigration Appeals ("Board") erroneously denied the visa petition for preference status filed by him on behalf of his out of wedlock son, Kin Kok Lau ("Kin") on the ground that Kin was ineligible for second preference status because he did not qualify either as a legitimate or a legitimated child as those terms are defined under

Sections 101(b)(1)(A) and 101(b)(1)(C) of the Immigration and Nationality Act (the "Act"). Both parties moved for summary judgment and on March 25, 1976, the Honorable Lloyd F. MacMahon, United States District Judge for the Southern District of New York, filed an opinion which granted Lau judgment against the INS. The INS filed its notice of appeal from the District Court's opinion and order on July 23, 1976 and Lau cross-appealed from part of the District Court's decision. The decision below is reported at 410 F. Supp.221.

FACTS

Lau, a 48 year old native and citizen of the People's Republic of China ("PRC"), was lawfully admitted to the United States as a permanent resident alien in 1966 as a second preference immigrant on the petition submitted by his father, You Lau, now deceased, but then a lawful resident alien. In 1973, he married in New York City, his first and only wife, Rose Cheung Lau, a permanent resident alien. There are no children of this marriage.

While in China, Lau cohabited with but did not marry Chin Dung You, mainly because of the opposition

of his father. From this cohabitation, two children were born in China: a daughter, Yee Sheung Lau, in October, 1948, and a son, Kin Kok Lau, in June, 1952. Lau lived with his children, supported and maintained them in his village household in China with his own mother until 1958 when Lau, unhappy with life under Communist rule, escaped to Hong Kong. For the next eight years he worked and lived in Hong Kong and remitted money to his mother to support his children.

In 1966, shortly after the enactment of the Immigration Reform Act of 1965, which, for the first time in history, enlarged the Chinese quota to a possible maximum of 20,000 immigrants a year, Lau was finally able to obtain legal admission to the United States. Since Lau has been in the United States, he has consistently supported and maintained his children.

Following relaxation of tensions between China and the United States as a result of President Nixon's visit to China in 1972, Lau was advised that it was a propitious time to petition for his son, who upon the approval of a petition, could obtain an exit visa from the PRC to emigrate to the United States. Lau submitted his petition to the Immigration & Naturalization Service in September

of 1973. Since China was and is a country with no statistical bureaus to record births and issue contemporaneous birth certificates, Lau, in accordance with established INS procedure in Chinese cases, submitted secondary evidence of his paternity of his son, such as voluntarily submitting to a blood test performed by an expert hematologist designated by the INS as proof of possible paternity, documentary evidence such as family pictures, proof of financial support of his son, letters from the son, and affidavits from petitioner's first cousin and a 70 year old woman from a neighboring village, both attesting on the basis of direct knowledge that Lau was the father of his son.* The Service denied his petition on February 28, 1974 on the grounds that Kin was illegitimate at birth and the Board affirmed the finding of the Service on October 23, 1974. The Court action was instituted shortly thereafter and resulted in the judgment from which the government appeals.

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* Other countries as well as China, which do not issue birth certificates include Afghanistan, Albania, Burma, Iran, Irac (prior to 1921), Nepal, Oman, and Saudi Arabia. In such cases American Consuls are instructed to accept substitute evidence. See Appendix B, PART IV FOREIGN AFFAIRS MANUAL. Guidelines in such cases for INS adjudicators were set forth in Matter of Chin, I.D. 2151, 14 I & N 150 (BIA 1972). See also: State Dept. Airgram (AA.4).

STATUTES

The pertinent sections of the Immigration and Nationality Act are as follows:

Section 101(b)(1) of the Act, 8 USC 1101(b)(1):

> The term "child" means an unmarried person under twenty-one years of age who is --
>
> (A) a legitimate child; or
>
> (B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred; or
>
> (C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation.
>
> (D) an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother;
>
> (E) a child adopted while under the age of fourteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: Provided, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act.

* * *

Section 203(a)(2); 8 USC 1153(a)(2):

> Aliens who are subject to the numerical limitations specified in section 201(a) shall be allotted visas or their conditional entry authorized, as the case may be, as follows:

(1) Visas shall be first made available, in a number not to exceed 20 per centum of the number specified in section 201(a)(ii), to qualified immigrants who are the unmarried sons or daughters of citizens of the United States.

(2) Visas shall next be made available, in a number not to exceed 20 per centum of the number specified in section 201(a)(ii), plus any visas not required for the classes specified in paragraph (1), to qualified immigrants who are the spouses, unmarried sons or unmarried daughters of an alien lawfully admitted for permanent residence.*

* * *

THE MARRIAGE LAW OF THE
PEOPLE'S REPUBLIC OF CHINA OF 1950

Chapter I. General Principles

Article 1. The feudal marriage system which is based on arbitrary and compulsory arrangements and the superiority of man over woman and ignores the children's interests shall be abolished.

The New-Democratic marriage system, which is based on the free choice of partners, on monogamy, on equal rights for both sexes, and on the protection of the lawful interests of women and children, shall be put into effect.

Article 2. Bigamy, concubinage, child betrothal, interference with the remarriage of widows, and the exaction of money or gifts in connection with marriages, shall be prohibited.

* * *

Chapter IV. Relations Between
Parents and Children

Article 13. Parents have the duty to rear and to educate their children; the children have the duty to support and to assist their parents. Neither the parents nor the children shall maltreat or desert one another.

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* Section 4 of the Act of October 20, 1976, 90 Stat. 2703, Public Law 94-571 makes changes in Section 203 not involved here.

Article 14. Parents and children shall have the right to inherit one another's property.

Article 15. Children born out of wedlock shall enjoy the same rights as children born in lawful wedlock. No person shall be allowed to harm them or discriminate against them.

Where the paternity of a child born out of wedlock is legally established by the mother of the child or by other witnesses or by other material evidence, the identified father must bear the whole or part of the cost of maintenance and education of the child until the age of eighteen.

With the consent of the mother, the natural father may have custody of the child.

With regard to the maintenance of a child born out of wedlock, in case its mother marries, the provisions of Article 22 shall apply.

Article 16. Husband or wife shall not maltreat or discriminate against children born of a previous marriage.

* * *

Chapter VI. Maintenance and Education of Children After Divorce

Article 20. The blood ties between parents and children do not end with the divorce of the parents. No matter whether the father or the mother acts as guardian of the children, they still remain the children of both parties.

After divorce both parents still have the duty to support and educate their children.

After divorce, the guiding principle is to allow the mother to have custody of a baby still being breast-fed. After the weaning of the child, if a dispute arises between the two parties over the guardianship and an agreement cannot be reached, the people's court shall render a decision in accordance with the interest of the child.

Article 21. If, after divorce, the mother is given custody of a child, the father shall be responsible for the whole or part of the necessary cost of the maintenance

and education of the child. Both parties shall reach an agreement regarding the amount and the duration of such maintenance and education. In the case where the two parties fail to reach an agreement, the people's court shall render a decision.

Payment may be made in cash, in kind or by tilling land allocated to the child.

Such agreement reached between parents or a decision rendered by the people's court in connection with the maintenance and education of a child shall not prevent the child from requesting either parent to increase the amount decided upon by agreement or by judicial decision.

Article 22. In the case where a divorced woman remarries and her husband is willing to pay the whole or part of the cost of maintaining and educating the child or children by her former husband, the father of the child or children is entitled to have such cost of maintenance and education reduced or to be exempted from bearing such cost in accordance with the circumstances.

* * *

SUMMARY OF ARGUMENT AND ISSUES

The constitutional question of denial of equal protection of the laws to fathers of out-of-wedlock children argued in Points I and II of the government's brief (pages 9 to 24), has been argued and awaits decision in the Supreme Court of the United States in Fiallo v. Levi, 406 F.S. 162 (E.D.N.Y. 1975), jurisdiction noted June 7, 1976, 426 U.S., 919, No. 75-6297. It is probable that case will be decided before the instant case is argued and considered by this Court.

In any event, the Appellee submits as its argument on this question and relies upon the dissenting opinion of District Judge Weinstein in the Fiallo case (A.112-133) which fully sets forth the reasons why the statute denies equal protection of the law to Appellee.

The Court below, however, did not reach the constitutional question but decided the case solely on its interpretation of the relevant provisions of the Immigration and Nationality Act of 1952 and of the Marriage Law of the People's Republic of China. The District Court held that in the case of children born under a legal system such as that prevailing in the People's Republic of China, in which legitimation is not restricted to formal court proceedings, our immigration statute is satisfied if the natural father shows by credible evidence the biological relationship to his child. If this view is correct, it will not be necessary to consider the constitutional question. In any event, no matter how the constitutional question is decided, the correctness of the decision below must be determined and it is to this question that the remainder of this brief is addressed.

POINT I

UNDER ARTICLE 15 OF THE MARRIAGE LAW OF THE PEOPLE'S REPUBLIC OF CHINA, AN OUT OF WEDLOCK CHILD IS LEGITIMATE AT BIRTH AND QUALIFIES FOR A PREFERENCE VISA AS A LEGITIMATE CHILD WITHIN THE MEANING OF SECTION 101(b)(1)(A) OF THE IMMIGRATION AND NATIONALITY ACT.

Whether a child is born legitimate or illegitimate depends on the applicable law of his parents' domicile at the time of the child's birth, Matter of Kwan, 13 I & N 302, 305 (BIA 1969). Lau was a domiciliary of mainland China in 1952 when his son, Kin Kok, was born there out of wedlock. The applicable law then in effect was the Marriage Law of the People's Republic of China (the "Marriage Law") which was enacted in 1950 immediately after the Chinese Nationalist Government was overthrown. Article I of the law denounced the previous regime's "feudal marriage system" as being based on arbitrary and compulsory arrangements, the notion of superiority of man over woman and the neglect of children's interests. With the enactment of the "New-Democractic marriage system", it proclaimed that the lawful interests of women and children would be protected. To protect children's interests Article 15 provided that "children born out of

wedlock enjoy the same rights as children born in wedlock. No person is allowed to harm them or discriminate against them".

The District Court rejected Lau's contention that his son was legitimate at birth on the basis that Article 15 appeared to draw at least "a semantic distinction between 'children born out of wedlock' and 'children born in lawful wedlock'"(A. 195). It is respectfully urged that the District Court erred in its over reliance on a perceived semantic difference in form rather than substance. If the drafters of Article 15 intended to "re-educate the masses" by abolishing such "feudal" notions as stigmatizing "/c/hildren born out of wedlock" and if they sought to invest them with all the legal rights and privileges enjoyed by "children born in lawful wedlock"[1] one would be hard put to conceive of a semantic somersault which could accomplish this purpose without the use of these two terms. Given the impreciseness inherent in translating a statute from a foreign language into English, which, in this case, is aggravated by a legal

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[1] Marriage Law and Policy in the Chinese People's Republic, by M.J. Meijer, Hong Kong University Press, 1971, (hereinafter referred to as "Meijer") pages 123 et. seq. A copy of this book has been delivered to the Clerk of Court for this Court's examination.

system radically different from ours, the District Court erred by an overemphasis on semantics and overlooking the spirit, purpose and evolutionary history of Article 15 and the opinions of scholars in Chinese law as to its meaning and interpretation.[2/]

1. The evolutionary history of Article 15.

A study of predecessor statutes to Article 15 clearly demonstrates the consistent purpose of the PRC government to abolish distinctions between legitimate and illegitimate children. Article 15's earliest statutory counterpart, Article 19 of the Marriage Law of the Chinese Soviet Republic of April 8, 1934,[3/] specifically stated that children born out of wedlock shall enjoy "all the rights granted to legitimate children". This provision was inspired by the 1926 Family Code of Russia which also invested children whose parents were not married with "the same rights

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[2/] Dr. Meijer's qualifications are set forth by Professor Stanley Lubman of the University of California Law School in Appellee's Appendix, page AA.8.

[3/] This law and subsequent legislation of 1939, 1942, 1943, 1944, infra, were enacted by the Chinese Communist government when it militarily occupied and governed different provinces in China on its famous "long march" in flight from the pursuing Chinese Nationalist Army during this period of the Chinese Civil War (1934 to 1949).

as those born in wedlock" (Meijer, pages 51, 52). As early as 1934, Meijer states that the Chinese Communists had established the legal principle of "equalization of legitimate and illegitimate children" and that under this statute "there was no difference between children born within or out of wedlock" (Ibid. p. 50). In the Marriage Regulations of the Shensi, Kansu, Ninghsia Border Area of April 4, 1939 Article 17 provided that children born out of wedlock "shall have all the rights and privileges" of children born in wedlock (Ibid. p.285, 286). Similarly, subsequent legislation enacted by the Chinese Communist government repeatedly endorsed the principle of legal equality between in and out of wedlock children. The Marriage Regulation of the Border Area of Shansi, Hopei, Shantung and Honan of 1942 and 1943 provided in Article 23 that children born out of wedlock "shall have the same position as a child born in wedlock" (Meijer pages 295, 297). In the Revised Provisional Marriage Regulations of the Shen-Kan-Ning Border Area of March 20, 1944, Article 13 again provided that in Article 13 that "Children born out of wedlock have the same rights as children born in wedlock; they shall not be discriminated against" (Meijer page 289).

2. The opinions of legal experts.

The two legal experts on Chinese law, Dr. Meijer relied on by Lau and Dr. Hsia, the government's expert, both agreed that all distinctions between in and out of wedlock children were abolished by Article 15 and that both types of children have equality of legal status.

In interpreting the full scope of Article 15, Dr. Meijer says it "provides expressly that illegitimate children shall enjoy the same rights as those born in wedlock, which means that they have the right to be brought up and educated and the right to inherit from both parents, plus, of course, the corresponding duty to support the parents" (Meijer, p. 73).[4/]

Meijer then convincingly demonstrates in his treatise that every article of the Marriage Law designed to protect the interests of in wedlock children apply equally and identically to out of wedlock children. Article 20 concerns the duty of parental maintenance and education of children after a divorce. Both children

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[4/] The litmus test of true equality betweeen in and out of wedlock children in most societies, including our own, has been whether they have equal rights of inheritance. Prior to Jimenez v. Weinberger, 417 U.S. 628 (1974) and Weber v. Aetna Casualty and Surety Company, 406 U.S. 164 (1972), the Supreme Court by a bare majority of 5-4 in Labine v. Vincent, 402 U.S. 990 (1971) upheld a Louisiana statute denying illegitimate children the benefit of intestate succession to property which was available to legitimate children. No doubt the Court would uphold a state statute giving all children equal rights of inheritance.

born in wedlock and those born out of wedlock are covered because "the ties between parents and children are not based on the marriage of the parents but on the blood relationship existing between them. This is strengthened by Article 15, which provides that children born out of wedlock shall enjoy the same rights as those born of a legal marriage. The relationship is based on descent" (Ibid., p. 227). Article 22 states that if a divorced woman remarries and her present husband is willing to pay all or part of the cost of supporting his stepchild, the natural father of the child may have his duty of child maintenance correspondingly reduced. This Article applies to the father of an out of wedlock child because "an illegitimate child of one of the parents in a family is in the same position as a stepchild" (Ibid., p. 208). Conversely, Article 16 of the Marriage Law provides that a husband or wife "shall not maltreat or discriminate against children born of a previous marriage". Notwithstanding the fact that an out of wedlock child could not be born of any "previous marriage", such a child, in the event his mother marries, is protected by Article 16 against stepfather abuse because the out of wedlock child "has the status of a

child born in wedlock" (Ibid., p. 207, 208). This equality of treatment for out of wedlock children is mandated because discrimination against them was a product of the "old social system" inconsistent with the "new Communist Morality" which holds that such children "are not responsible for the mistakes of their parents" (Ibid., 208).[5/]

In an effort to obtain an independent source of information as to Chinese law, the then United States Attorney Paul Curran wrote to Dr. Tao-tai Hsia, Chief of Far Eastern Law Division of the Library of Congress. Dr. Hsia not only confirms Dr. Meijer's status as an expert but describes his book Marriage Law and Policy in the Chinese People's Republic as "the most exhaustive study of marriage law in the PRC". (A. 44).[6/]

[5/]Compassion for out of wedlock children is by no means confined to socialist countries. In Weber v. Aetna Cas. & Surety Co., 406 U.S. 164 Justice Powell on page 175 said: "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrong doing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual - as well as an unjust - way of deterring the parent."

[6/]Appendix references preceded by "A." refer to Appellant's and those by "AA." to Appellee's appendix.

Dr. Hsia's opinion is that "the rights of children born in and out of wedlock are identical" and that the status of "legitimated children" as "a halfway house" between illegitimacy and the status of legitimate child born in wedlock "probably would not exist in the PRC" (Ibid). In response to Mr. Curran's inquiry as to whether there were any "discrepancies" between the rights of children born in and out of wedlock, Dr. Hsia states that "the statement of their absolute equality contained in the 1950 Marriage Law must be taken quite literally" [7/] and that he knew of no source of information which would reveal "any discrepancy". (A. 46). With respect to the rights of inheritance, Dr. Hsia is of the opinion that "the right of a child born out of wedlock to be an heir is so identical to the right of a child born in wedlock that consideration by the court is unnecessary. In other words, the identity of the rights of these two types of children is such that it is apparently not subject to question or

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7/ The District Court, in rejecting Lau's contention that Article 15 granted his son legitimacy at birth, cited the Hungarian statute in Matter of G--, 9 I & N 518,520 (A. 195; fn. 14 at A. 200). There, the Board held the child was legitimate at birth because it observed "there are no legitimate or illegitimate children in Hungary any more, only children of equal status." If semantics is pivotal on this issue, it is submitted that Dr. Hsia's statement that the legal status of in and out of wedlock children is one of "absolute equality" at least equals if not exceeds the Board's criterion of "children of equal status."

qualification by the court" (A.46).

3. Article 15's similarity to statutes of other countries legitimating at birth out of wedlock children.

In construing statutes of other countries, including Communist countries, which purport to legitimate at birth out of wedlock children, the Board has adopted liberal interpretations and has held that such children are legitimate and entitled to immigration preferences.

In Matter of Sinclair, 13 I & N 613 (BIA 1970) a case involving a out of wedlock child born in 1947, Article 58 of the Panamanian Constitution of 1946 provided:

> Parents have the same duties with respect to their children born out of wedlock as they do toward children born in wedlock. All children are equal before the law and have the same rights of inheritance in intestate succession.

In construing this law, which is similar in substance to the Chinese Marriage Law in wording, scope, and purpose, the Board concluded that the child was the "legitimate child" of the natural father.

Matter of K-, 8 I & N 73 (BIA 1958) involved interpreting Communist laws on illegitimate children born in Poland. There, a father petitioned for his daughter, born out of wedlock in 1939. The only document of

paternity submitted by the father was a delayed certificate of birth based on a baptism certificate executed 9 years after the child's birth. The Board reviewed the various Polish statutes dealing with illegitimate children. The 1946 statute abandoned the use of the terms "legitimate" and "illegitimate", replacing them with terms of children born "in and out of wedlock". The Board noted that Article 86 of this statute specifically provided that a "child acknowledged by his father shall have the legal status of a child born in wedlock" (at p. 74).

By 1950 a new Code of Domestic Relations law was enacted. The Board noted it "abolished all distinctions between the legal status of a child born of legally married parents and that of a child born out of wedlock" and that all that was required to give the illegitimate child the "legal status equal to that of a child born in wedlock" is the establishment of paternity by court decree or by "acknowledgement" by the father (p. 76).

Liberally construing the 1950 Code as having retroactive effect the Board held that the Polish law made the child "legitimate" and that he was eligible for a

visa either as "the legitimate or legitimated" child of the petitioner.[8/]

Seven years later in Matter of Chojnowski, 11 I & N 287 (BIA 1965) the Board took a second look at the Polish statutes in the case of a child born out of wedlock in Poland in 1948. At the time of the child's birth the father acknowledged paternity by applying for a birth certificate from the Civil Status Registry. This time the Board noted that the law to apply was the law existing at the time the father acknowledged paternity in 1948. The law then in effect was the 1946 Family Law of Poland which provided under Article 68, that an out of wedlock child acknowledged by the father "enjoyed the full legal status of a child born in wedlock". Construing the Polish statute, similar in so many respects to the Article 15, the Board found no difficulty in reaching the conclusion that "the child is legitimate" (p. 289).

Matter of Jancar, 11 I & N 365 (BIA 1965) involved a 21 year old illegitimate child born in Yugoslavia in

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8/ The Board in this case as it has in others used interchangeably the legal concepts of "legitimate" and "legitimation" without drawing any distinction between the two terms. Thus, although the Board stated in Matter of G, 9 I & N 518, 520, in the next to last paragraph that the child was the "legitimated child" of the father, it concluded in the headnote that the child was the 'legitimate child' of the natural father.

1944, who was being petitioned for by the father.

The Board noted that the "new socialist system" introduced in Yugoslavia, "paid special attention" to children born out of wedlock and provided that "children born out of wedlock are considered equal to those born in wedlock with respect to their rights toward their parents and the rights and duties of their parents towards them".[9/]

Holding that in Yugoslavia acknowledgement of paternity may be either through voluntary acts or by court action, an individualized admission of paternity by the father's informal written declaration was to the Board sufficient acknowledgement of paternity to render the child legitimate under Section 101(b)(1)(A) or a legitimated child under 101(b)(1)(C).

In view of the past generous liberal treatment accorded to out of wedlock children, both in Communist and non-communist countries, the Board's hard-nosed refusal to accord similar rights to out of wedlock Chinese children in China is both incomprehensible and indefensible .

9/ Compare this observation with Dr. Meijer's statement that Article 15 provided that out of wedlock children in China have same rights as legitimate children, with the same right to be brought up and educated, the right of inheritance and the corresponding duty to support their parents (Meijer, p. 73).

POINT II

ASSUMING THAT THE DISTRICT COURT CORRECTLY DETERMINED THAT PLAINTIFF'S SON WAS NOT LEGITIMATE AT BIRTH, THE COURT DID NOT ERR BY HOLDING THAT HE COULD ESTABLISH ELIGIBILITY PREFERENCE FOR HIS SON BY FACTUAL PROOF OF FAMILIAL RELATIONSHIP.

1. The erroneous Board decision warranted reversal.

The government argues that the Court below erred in rejecting the Board's ruling requiring a paternity proceeding establishment under Article 15 (Br. 24,25). This interpretation of Article 15 by the Board was based on the precedent decision of Matter of Lo, Interim Decision 2209, 14 I & N 379, (BIA 1973). The beneficiary in that case was a 27 year old male born out of wedlock in China. The Board held that the beneficiary was ineligible for the visa because his father had never 'legally established paternity' which, the Board stated, was required by Article 15 of the Marriage Law. The Board did not articulate or specify what steps were required of Lo to "legally establish paternity" nor did it state whether it would do him any good if he had. On the contrary, the Board took the unusual step of fashioning an additional "Catch 22" formula to the effect that even if the paternity is "legally established" it did not necessarily

mean that it was "tantamount to legitimation for immigration purposes" or, if so, whether Article 15 has retroactive effect serving to legitimate persons born prior to the promulgation of Article 15.

The Lo case dealt with issues of first impression and involved interpreting for the first time an important provision of Chinese Law. Yet the Board cited no authorities, failed to consult the Library of Congress as it usually does in cases involving construction of foreign law,[10/] and devoted less than two pages of discussion to a decision which was meant to serve as a legal precedent (8 C.F.R. 3.1(g)).

10/ Although the Board in the present case cavalierly dismissed the Library of Congress opinion submitted by Lau (A.8), by stating that the "Board", not the Library of Congress, must make the ultimate interpretation of foreign statutory provisions in immigration cases, the Board has relied almost exclusively in the past in other cases on the Library of Congress in interpreting foreign law. Matter of Sinclair, 13 I & N 613; Matter of Zapletalova, 12 I & N Dec. 258,259; Matter of Boghdadi, 12 I & N Dec. 666,667; Matter of Chong, 13 I & N Dec. 45, 46,47; Matter of Kim, Interim Decision 2258 (BIA 1974); Matter of K, 8 I & N Dec.73,74; Matter of Chojnowski, 11 I & N Dec. 287, 288; Matter of Jancar, 11 I & N Dec. 365,366; Matter of G-, 9 I & N 518 (BIA 1961); Matter of Gamero, I.D. 2281, 14 I & N 674 (BIA 1974); Matter of Ma, I.D. 2314 (BIA 1974).

A hip shot decision of this type is capable of infinite mischief.[11] It does not furnish lower level adjudicatory examiners with guidelines to rule on relative petitions. Worse, it is an open license for them to vent their own individual prejudices and caprices in denying petitions of out of wedlock children born in mainland China. By failing conspiciously to articulate the criteria for "legally establishing paternity" the individual examiner is left room to fashion on an ad hoc basis various devices for denying visa petitions no matter what paternity proof a petitioner may offer. Even if paternity is "established"

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[11] In the past the Board has in other cases of Chinese children, in contrast to its normally high standards of legal research, rendered transparently erroneous decisions which blocked immigration privileges in possibly hundreds of cases. Thus, in Matter of Yiu, I.D. 2061, 13 I & N 2061 (BIA 1970), the Board took the preposterous position that under Chinese customary law legal adoptions were confined to male children and that adoptions of females were prohibited. In Matter of Yee, I.D. 2060, 13 I & N 620 (BIA 1970), it held that in the absence of a prescribed procedure for effecting adoptions in Communist China the legal institution of adoption was presumed not to exist in that country. These two decisions were later fortunately reversed in Matter of Ng, I.D. 2147, 14 I & N 135 (BIA 1972) and Matter of Yee, I.D. 2146, 14 I & N 132 (BIA 1972).

the examiners would still have additional defenses by claiming that such proof is still not "legitimation for immigration purposes".[12/]

Although the Board had Meijer's book in its library[13/] no reference was made to this authoritative source. If the Board had examined Meijer's treatise, it would have found, as the District Court did, that the second paragraph of Article 15 refers to paternity suits to compel child support in those cases where the father denies paternity and has no reference to and does not concern legitimation proceedings of out of wedlock children where the father admits paternity (Meijer, p. 208). Moreoever, if the Board as it invariably does in other foreign law cases, had sought guidance from the Library of Congress, it would have discovered that the Chief of the Far Eastern Law Section would have stated that there is no formal legitimation procedure in China and that "the status

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12/ Maurice Roberts, formerly Chairman of the Board of Immigration Appeals, in his recent article, Administrative Discretion, 13 San Diego Law Review 144, at 153, 154 (1975) discusses the possibility of adjudicators abusing their discretion by denying visa petitions on the basis of subjective feelings against certain races or nationalities.

13/ Matter of Yee, I.D. 2146, 14 I & N 620 (BIA 1972) cites Meijer as an authoritative source on the law of the PRC.

of a legitimated child as a halfway house between illegitimacy and the status of a legitimate child born in wedlock would probably not exist in the PRC" because the rights of children born in and out of wedlock are identical (A.44,45). The inexplicable failure of the Board to examine readily accessible authoritative sources on Chinese law led it to an egregiously erroneous interpretation of Article 15 and the District Court's reversal of that decision was eminently correct.

2. Eligibility for immigration preference is met by factual proof of relationship to the petitioning father.

The Court below found that since the legal system in the People's Republic of China provides no prescribed official procedure by which an out of wedlock child could be legitimated, the requirements and purposes of the immigration statute giving legitimated children a preference are satisfied if the natural father establishes by credible evidence his relationship to his child and that they treated each other as father and son. The government assails this decision as incorrect. It argues that Section 101(b)(1)(C) contains a "specific" legal requirement of "a formal act" of legitimation (Br.27)

and that if the PRC has no prescribed formal procedure to effect legitimation, the "unfavorable consequences" of this result "should have fallen" on the petitioner rather than on the government (Br. 26). The proper "solution", asserts the government, would have been for the Court to look to the "only alternative" provided by Congress, i.e., to determine whether the child had been legitimated under the law of New York, which is the place of the father's residence and domicile (Br.27). Taking this last contention first, the short answer to this proposed "solution" is that it is neither legally sound nor practically efficacious, and is no solution at all. Plaintiff is presently married to his wife, Rose Cheng Lau, and he obviously could not now marry the mother of his son - assuming he could now locate her - to satisfy the requirements of a "marriage" -- even a void one - which is the only way he could legitimate his son (Domestic Relations Law, Sections 24 and 33, McKinney 1964 and the Cumulative Supplement 1976-1977.[14/] Moreoever,

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14/ The government also suggests by implication (Br.5) various other alternative remedies for plaintiff's son such as obtaining a labor certification to qualify for sixth preference or immigrating as a nonpreference immigrant. These remedies are also illusory and non-existent. The plaintiff's son is a farmer and does not possess any critical skills which could qualify him for a labor certification, a requirement both for sixth preference and nonpreference immigrants. Moroever, the nonpreference immigrant quota for China is far oversubscribed and is not available (Harper, Immigration Laws of the United States, pages 153, 154 (Bobbs-Merril 1975)).

such a "marriage" could not possibly legitimate the son as required under the immigration statute because he is now over 18 years of age.[15/]

Second, the government argument rests upon the fallacious assumption that if a country lacks a formal administrative or judicial procedure for effecting legitimation it necessarily means that there is no other way to achieve a status of legal legitimacy or its functional equivalent. A country's laws and legal system are not confined to written laws and procedural statutes. It embraces the customs and practices of the people as well as executive orders, government policies, legislation and decisions of administrative and judicial agencies. This is especially true in China which has a formal legal system but no practicing lawyers and very little procedural legislation. Indeed, that government resists any move towards "formal and legalistic settlement of disputes", preferring a system where non criminal cases are settled without recourse to formal legal institutions (On Understanding Chinese Law and Legal Institutions, by Stanley Lubman, 62 ABAJ 596, 597 (1976)). Professor Lubman states that local level organizations, more than courts, deal with disputes, maintain public order and

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15/ A filiation proceeding is not a possible remedy because such a proceeding must be instituted either during the pregnancy of the mother or within two years after the birth of the child (EPTL 4-1.2(a)(2)).

political orthodoxy, settle most controversies and control anti-social conduct through persuasion (Ibid. p. 597,598). Given the overriding governmental concern for protection of the interests of out of wedlock children as reflected in Article 15 it would seem highly unlikely that under such a system, voluntary acknowledgement of paternity by unofficial acts such as supporting a child, living with him, treating him as one's own son, would not suffice to legally legitimate him (See also: Present-Day Law in the People's Republic of China, R.P. Brown, Jr. 61 ABAJ 474, at p. 478).

In the context of our immigration statute, Congress, as early as 1957 manifested its concern for out of wedlock children by stating that in construing the word "child" "/s/ympathetic and humane considerations dictate an interpretation which would not separate the child, whether legitimate or illegitimate, from its alien parent * * * " U.S. Code Cong. & Admin. News, 1957, p. 2021. When that concern was re-emphasized in the Immigration Reform Act of 1965 to the effect that "/r/eunification of the family is to be the foremost consideration" (S. Rep. No. 748, 89th Cong. 1st Sess. U.S. Code Cong. & Admin. News (1965) p. 3332)), the District Court did not err in implementing

that objective by holding that Lau's son should be considered the equivalent of a legitimated child if he proves the requisite familial relationship to his father. This solution fashioned by the Court is neither novel nor unprecedented. Indeed, the lack of an official process for effecting legitimation has never hindered the Board in the past from holding children legitimate if legitimation could be spelled out by voluntary acts of the parties in recognition and affirmation of a parent-child relationship. In Matter of K-, supra at p. 76, the Board was confronted with the case of an illegitimate child born before the enactment of the various Polish laws of 1946, 1950 and 1953 which abolished distinctions between children born in and out of wedlock. Noting that the present Polish law provided no known procedure for 'legitimation' and that such a procedure was not possible as a "constructive institution", the Board held that the child was eligible for immigration privileges if he could establish paternity either by a court decree or "by acknowledgement by the father" (8 I & N at p. 76). In Matter of Kwan, 13 I & N 302 at p. 303, the Board construed Article 1066 of the Chinese Nationalist Civil Code which provided

that a child born out of wedlock who was acknowledged by the natural father was deemed legitimate. "Acknowledgment" under that statute is established merely by showing that the child was "maintained" by the natural father. Although the Chinese Nationalists, like the PRC, have no official procedure to legitimate a child, the Board did not even deem this factor worthy of mention and held legitimate out of wedlock children who were supported by their father. See also Matter of Lo, supra. Indeed, legitimation by unofficial acts of the parties, without resort to formal procedures, exists even in this country. In Matter of Garcia, 12 I & N 628 (BIA 1968) the Board construed what was then Section 230 of the California Civil Code, which provided that where an illegitimate child was received by the father into his family openly acknowledged as his child with the consent of his wife, if married and otherwise treated as a legitimate child, the child becomes legitimated. The Board construed this law as a "statute of legitimation" and applied it liberally to the extent that even though the legitimated child had never resided in this country, though father was a domiciliary of California, the beneficiary became a

legitimated son under the California Civil Code.

Within the parameters of legitimation decisions affirming the validity of unofficial, informal acts of a legitimation by the parties involved as decided by the Board, it is submitted that the District Court was correct in holding that Plaintiff's son was eligible for an immigration preference if the actual relationship could be proved.

For analogous decisions establishing preferential rights for out of wedlock stepchildren, see: Nation v. Esperdy, 239 F. Supp. 531 (SDNY 1965); Andrade v. Esperdy, 270 F. Supp. 516 (SDNY 1967); Matter of Stultz, I.D. 2401 (Attorney General 1975).

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

EDWARD J. ENNIS
8 West 40th Street
New York, New York 10018

BENJAMIN GIM
217 Park Row
New York, New York 10038

Attorneys for Appellee

Dated: New York City
April 15, 1977

APPENDIX

INDEX TO APPENDIX

Relevant Docket Entries

Date	*Proceeding*
3/13/75	Filed Complaint and issued Summons.
6/ 3 /75	Filed answer to complaint.
12/11/75	Filed Defendant's motion for summary judgment.
12/11/75	Filed Plaintiff's cross motion for summary judgment.
1/ 5 /76	Filed Defendant's Reply Brief. Filed Plaintiff's Reply Brief.
3/25/76	Filed Opinion #44118 . . . Plaintiff's motion for summary judgment granted and matter remanded—McMahon, J.
5/24/76	Filed judgment and order in favor of plaintiff.
7/23/76	Filed Defendant's notice of appeal.
8/ 2 /76	Filed Plaintiff's notice of cross-appeal.

AA.1

BENJAMIN GIM, P.C.
COUNSELLOR AT LAW

217 PARK ROW
NEW YORK, N.Y., 10038
BEEKMAN 3-1088

January 6, 1976

The Honorable Lloyd F. MacMahon
United States District Judge
Room 2202
United States Courthouse
Foley Square
New York, New York 10007

Re: CHIN LAU v. KILEY
75 Civ. 1237 (LFM)

Dear Judge MacMahon:

We respond to the new matter cited in the government's reply brief consisting of a February 13, 1975 amendment to the Foreign Affairs Manual which indicates that the government of the People's Republic of China was prepared to issue documents confirming birth, marriage and family relationships. These instructions have now been further modified by paragraph 7 of a State Department airgram dated October 9, 1975, a photostatic copy of which is herewith attached, withdrawing that earlier directive because of difficulties arising from any attempt to obtain such documents and emphasizing again the reliance on secondary evidence.

Very truly yours,

Benjamin Gim

BG/jl

encls.

cc: Thomas H. Belote, Esq.
Special Assistant U.S. Attorney
U.S. Courthouse, Foley Sq. New York, N.Y.

P750155-1179

AIRGRAM

HANDLING	CLASSIFICATION	MESSAGE REFERENCE NO.
	UNCLASSIFIED	A-6418

TO: ALL AMERICAN DIPLOMATIC AND CONSULAR POSTS (EXCEPT CHIANG MAI) AND THE DISTRICT ADMINISTRATORS OF THE TRUST TERRITORY OF THE PACIFIC ISLANDS, THE GOVERNOR OF AMERICAN SAMOA, AND THE EXECUTIVE SECRETARY OF THE CANAL ZONE

FROM: Department of State

DATE: 1975 OCT -9 PM 2:44

E.O. 11652: N/A

TAGS: CVIS

SUBJECT: Meeting with Association of Immigration and Nationality Lawyers

REF:

DEPT. DISTRIBUTION

ORIGIN/ACTION VO-35

AF 3	ARA 5	CU	EA 4
EB	EUR 3	INR	IO
L 2	NEA 6	PER	PM
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AGR	AID	AIR	ARMY
CIA	COM	DOD	DOT
FRB	HEW	INT	LAB
NAVY	NSA	NSC	OPIC
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XMB			INS 1

SUGGESTED DISTRIBUTION: VO-32

The purpose of this airgram is to transmit to the field a summary of discussions held September 11, 1975 between representatives of the Department (VO) and members of the Association of Immigration and Nationality Lawyers (AINL). The Department wishes to emphasize that attorneys have a vital and proper role to play in the visa issuing process, and urges all posts to be responsive to the attorney of record in a case. In order to improve understanding between the Department and AINL, the Department will henceforth send summaries of meetings of this kind to the field as appropriate.

Following are the issues discussed:

1. Correspondence with attorneys - Complaints were made that some consular officers did not respond to inquiries by attorneys, did not give clear reasons for refusals, did not indicate what documents were missing or inadequate, inquired into the privileged attorney-client relationship, and failed to provide reasons for delays in processing cases. VO representatives cited the instructions that had been sent to the field concerning the position of the attorney in the visa process, calling attention to relevant

UNCLASSIFIED

CLASSIFICATION

DRAFTED BY:	DRAFTING DATE	PHONE NO.	CONTENTS AND CLASSIFICATION APPROVED BY:
SCA/VO:DKCunningham:jmw	10/7/75	2198	SCA/VO: Julio J. Arias

CLEARANCES:
SCA/VO:NJKrieg
SCA/VO:SADobrenchuk
SCA/VO:CGShepherd
SCA/VO:CDScully
SCA/VO:FHBaker

FORM DS-1254

VO-2267

regulations (FAM,App.D, Part IV Correspondence, Note 9.2), and promised to continue to keep the problem under scrutiny. AINL representatives were asked to bring specific cases of difficulty to the attention of VO. With regard to the problem of insufficient information provided at the time of a refusal, an instruction to all posts is in preparation.

2. Availability of numbers -

Western Hemisphere - For the last two years, the cutoff date has moved three to four weeks with each monthly allotment. Since no drastic change in the demand for Western Hemisphere numbers is anticipated, it is expected that the oversubscription will remain at about 26 months for some time in the future.

China - The heavy demand for China numbers in the first five preference categories means that China nonpreference numbers are not likely to be available for some time. There is also a considerable backlog of China sixth and seventh preference applicants awaiting numbers.

Korea - Korean fifth preference is oversubscribed with an April 1, 1975 cutoff date. No sixth or nonpreference numbers are expected to be available in this fiscal year.

Unused numbers - Approximately 4,700 Eastern Hemisphere numbers were not used in FY - 74 because the entire demand for June allotment was satisified. Approximately 1,000 numbers from the Western Hemisphere limit were not used, despite calculated over allocations for June, because some numbers were returned unused. However, the numbers unused are less one per cent of the overall limit, and we believe that this is probably the best that can be done.

3. Public charge - The regulations amending the public charge requirements and the applicability of Section 212(a)(15) of the INA are awaiting final approval by OMB and should be published in the Federal Register within the next few weeks.

4. Review of consular decisions - The Department's position with regard to determinations in visa cases is that the Visa Office is the final authority on questions of law (outside the courts, of course), while the consular officer remains sovereign over questions of fact and judgment. In the absence

of changes in existing statutes, the Department believes that there is no basis for changing this policy.

5. Information provided to INS - AINL representatives raised the issue of the necessity and propriety of consular officers advising the INS when a visa applicant registers his case and there is an indication that he is in the U.S. illegally. It was explained that consular officers are under instructions to report to INS information concerning possible violations of law, and that the Department continues to believe this policy is both legitimate and ethical.

6. Requests for documents - Neither the law nor the regulations require a visa applicant to produce such documents as tax returns, hospital bills for the birth of a U.S. citizen child, etc. and such documents should not be required routinely. However, such documents may be required by the consular officer in specific cases to verify the facts presented. There should, of course, be a relationship between the documents requested and the issue which the consular officer is raising.

7. Documents from the People's Republic of China - Problems have arisen from following the presently prescribed procedures in that families residing in the PRC are exposed to pressures by the PRC Government when it is revealed that they have close relatives in the U.S. A new instruction dealing with this problem and focusing in particular upon the acceptability of secondary evidence is being prepared.

8. I-601 waivers - The problem of delays in the handling of applications for waiver of inadmissibility was discussed, and VO agreed to issue an instruction reminding consular officers that these cases should be processed as expeditiously as possible. In addition, when waivers of 212(a)(19) are involved, some consular officers appear to be completing the I-601 forms in such a manner as to indicate that the applicant is admitting or confessing the visa fraud, thus precluding review of the willfulness or materiality of the misrepresentation. VO's position is that applicants should not be compelled to admit to a violation of law against their will, and that the statement on the form should indicate simply that the consular officer has found the applicant ineligible.

9. L-1 visas - AINL representatives complained that some consular officers appear to be issuing L-1 visas with more limited validity than that prescribed by the reciprocity provisions of 221(c). They were informed that consular officers are encouraged

AA.5

BENJAMIN GIM, P.C.
COUNSELLOR AT LAW

217 Park Row - New York City, N.Y. 10038
AREA CODE (212) 233-1088

January 8, 1976

Honorable Lloyd F. MacMahon
United States District Judge
Room 2202
United States Courthouse
Foley Square
New York, N.Y. 10007

Re: Chin Lau v. Kiley
75 Civ. 1237 (LFM)

Dear Judge MacMahon:

I am delivering a copy of the book Marriage Law and Policy in the Chinese People's Republic (Hong Kong 1971), by M.J. Meijier, together with a photostatic copy of a letter from Prof. Stanley Lubman of the University of California Law School at Berkeley, setting forth on page 2 his qualifications as well as those of Dr. Meijier's.

I would greatly appreciate it if this book is returned to me when you are through with it.

Very truly yours,

Benjamin Gim

BG/lc
encls.

AA.6

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SCHOOL OF LAW (BOALT HALL)
BERKELEY, CALIFORNIA 94720

November 17, 1971

Robert S. Bixby, Esq.
Fallon, Hargreaves & Bixby
30 Hotaling Place
San Francisco, California 94111

Dear Mr. Bixby:

I am pleased to respond to your request for an opinion on the conclusions reached by the Board of Immigration Appeals in Matter of Yiu, November 19, 1970 (Interim Decision No. 2061) and in Matter of Yee, November 5, 1970 (Interim Decision No. 2060). They are set forth below, followed by a short statement of the professional training and background which reflect my special knowledge of Chinese law.

1. Matter of Yiu

In Matter of Yiu, the Board decided that under Chinese customary law the adoption of a female would be impossible, basing its conclusion on the propositions that adoptions were permitted only for purposes of succession to the family and was limited to males, and that adoptions were recognized as valid only when all kindred had been exhausted and the adopted child had the same surname as the adopting parent.

The Chinese law and custom referred to above recognized several institutions with different functions which correspond to the Anglo-American institution of "adoption." The major form of adoption was the selection of a male by any person without male children of his own, to continue the succession, i.e., to perpetuate the lineage of the adoptive father. By reason of the signal religious importance of the perpetuation of the lineage, it was this type of adoption that was regulated by the law code of the Chinese Empire, the Ta-ch'ing lu-li, the relevant portion of which has been translated into English in Jamieson, Chinese Family and Commercial Law, 13-15 (1921, reissue 1970).

Chinese law and custom also recognized another form of adoption, of a male or a female, who as a result of the transaction stood in the relationship of son or daughter to the adoptive parent, but without becoming an heir to continue the lineage. The existence of the practice is clearly recognized in the report entitled "Child Adoption and Domestic Service among Hong Kong Chinese," by J. Russell, Puisne Judge in Hong Kong, and dated 1883. Russell notes (p. 2) that "adoption of male children in China is founded on the necessity of having a male representative to perform sacrificial ancestral rites," and describes the ceremony of adoption. He then continues:

Adoption of female children as daughters. The system is conducted in the same manner as the adoption of males; but comparatively few children are adopted. They have equal rights with natural-born daughters. They are provided with a dowry when married, but, like natural-born daughters, they have no other claim on the inheritance.

The distinction between adoption of a male for succession purposes and adoption of a male or a female not for purposes of succession has been recognized by other experts on Chinese law. The distinction is explicitly recognized in the expert opinion relied on by the Board in Matter of Yue, Interim Decision No. 1967, A-17295317, May 29, 1968 and the unreported Matter of Lung Chan, VP-3-I-123920 (April 30, 1962) referred to therein; and in the expert opinion of Dr. Fu-shun Lin relied on in Matter of Chin, Interim Decision No. 1737, A-19628751, March 24, 1967.

I might note also that the material on which the Board relies to support its conclusion that adoption was limited to males, the Report of the Governor's Committee on Chinese Law and Custom in Hong Kong, p. 49 (Hong Kong 1948) is not, however, part of the report itself but is the opinion of one expert who is clearly discussing adoption only for succession purposes, and is therefore inapplicable.

The decision in Yiu also states that the adopted child must share its same surname with the adoptive parent, and relies on an extract from the report quoted above by J. Russell, on "Child Adoption and Domestic Service among Hong Kong Chinese." The extract quoted and relied on, however, is only that portion of the report which discusses adoption of males for succession purposes; the portion of the Russell report quoted above has been omitted, although it clearly recognizes the adoption of female strangers.

In my opinion, the weight of learned opinion recognizes the adoption of female children under Chinese law and custom, and the allegedly contrary authorities cited in Matter of Yiu are either irrelevant or erroneous, as stated above. I might note in this connection that the latest and most authoritative book on Chinese family law, Marriage Law and Policy in the Chinese People's Republic (Hong Kong 1971), by M. J. Meijier, a widely recognized scholar on the subject, specifically recognizes the "adoption" of female children out of charitable motives and not for purposes of succession, and cites as authorities leading Japanese and French treatises on Chinese law (p. 71).

2. Matter of Yee

In Matter of Yee, the Board decided that the Marriage Law of the People's Republic of China does not recognize a "relationship equivalent to adoption." Here again, leading scholarly authority unequivocally points to an opposite conclusion.

I refer here again to the just-published treatise by Dr. Meijier cited above. I might note that Dr. Meijier is a Dutch diplomat, trained as a lawyer, who speaks and reads Chinese and Japanese, and who has spent many years in China and Hong Kong. He is personally known to me, as is his reputation as a meticulous scholar of Chinese family law who has devoted many years to his studies.

Dr. Meijier, in his treatise, traces the history and development of marriage law and policy in the People's Republic. With respect to adoption, he notes that in the Soviet law to which the Chinese looked when they drafted their own, adoption was specifically recognized (p. 52). Meijier also notes (p. 74) that adoption was specifically recognized by the Communist governments which ruled large areas of China before the People's Republic was established in 1950. It is in this context that he notes that in Article 13 of the Marriage Law," the possibility of adoption is impliedly recognized by equalizing adoptive and blood relationships" (p. 74).

Moreover, Dr. Meijier presents additional information which indicates that in interpreting Article 13, Chinese Communist legal and civil authorities have given effect to adoptions. He cites, for instance, an undated decision of the Supreme Court, which, he notes, "states that there should be an agreement between the parents of the child and its adoptive parents. It is not necessary that such an agreement should be in writing" (p. 206). The Court's own language, quoted by Meijier, are clear that "whether this relationship of adoption exists or not must be determined according to the historical facts. When in fact an adoptive relationship exists even in the absence of a contract, we must recognize it as valid. . ." (pp. 206-207).

In addition, Meijier summarizes and quotes extensively from other Chinese Communist discussions of adoption which make it clear, contrary to the Board's decision, that Article 13 of the Marriage Law contemplates a true adoptive relationship. He notes, for instance that a book published on the Marriage Law in 1964 states that no document was required (p. 207). He notes further that adopted children inherited like natural children, according to the Collection of Material on the Civil Law of the Chinese People's Republic, a university law text published in 1954 (p. 258). A later university law textbook published in 1957 also indicates the existence of the right of adopted children to inherit from their adoptive parents (pp. 325, 326), and further expressly recognizes that no formality was necessary.

In view of this overwhelming evidence cited by a leading authority on Chinese family law from Chinese sources themselves, one as recently as 1964, I have not the slightest hesitation in stating that the decision of the Board in Matter of Yee is clearly wrong. The Chinese Marriage Law does create a relationship equivalent to adoption.

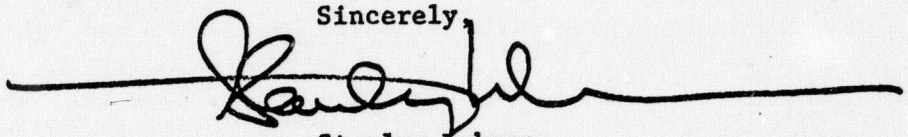
3. Professional qualifications

I hold the degrees of A.B., LL.B., LL.M. and J.S.D. from the School of Law of Columbia University, and am a member of the Bars of the states of New York and California. My special field of interest is Chinese law, including the legal institutions of Imperial China before 1911, the Chinese Republic from 1911 to 1949, and the People's Republic of China since 1949. I was trained for specialization in Chinese law from 1963 to 1967. Under grants from the Rockefeller Foundation, the Foreign Area Fellowship Program of the Social Science Research Council - American Council of Learned Societies, and Columbia University, I studied the Chinese language, Chinese society and Chinese law, including the family law of China and Hong Kong, at Columbia University (1963-1965) and in Hong Kong (1965-1967). Since

1967, I have been teaching courses and seminars at the School of Law of the University of California at Berkeley on Chinese law. The subject matter of these courses has included, inter alia, Chinese family law.

Trusting that this letter responds adequately and clearly to the two questions you inquired about, I am,

Sincerely,



Stanley Lubman
Acting Professor of Law

SL:jen